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In the
Supreme Court of the United States

RODERICK JACKSON,

Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether this Court can imply a private right of action for retaliation under Title IX.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE PRINCIPLE OF FEDERALISM WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX 5

II. THE SEPARATION-OF-POWERS DOCTRINE WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX 11

III. PUBLIC POLICY MILITATES AGAINST FINDING A PRIVATE RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX 14

CONCLUSION 17

TABLE OF AUTHORITIES

Page

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) .. 1-2, 10, 12-14

Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 515 U.S. 687 (1995) 2

Bennett v. Spear, 520 U.S. 154 (1997) 2

Cannon v. University of Chicago, 441 U.S. 677 (1979) ... 8

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) 2

Conroy v. Aniskoff, 507 U.S. 511 (1993) 16

Cort v. Ash, 422 U.S. 66 (1975) 12

Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) 2, 8

Douglas County v. Babbitt, 516 U.S. 1042 (1996) 2

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) 8

I.N.S. v. Chadha, 462 U.S. 919 (1983) 12

James v. Jones, 148 F.R.D. 196 (W.D. Ky. 1993) 9

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 14-15

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981) 7, 15

Rosado v. Wyman, 397 U.S. 397 (1970) 9

South Dakota v. Dole, 483 U.S. 203 (1987) 3, 6-7

Steel Co. v. Citizens for a Better Env't, 523 U.S. 83 (1998) 2

TABLE OF AUTHORITIES—Continued

Page

Valeria G. v. Wilson,
12 F. Supp. 2d 1007 (N.D. Cal. 1998) 1

Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498 (1990) 12

Federal Constitution

U.S. Const. amend. X 3-6, 9, 11

U.S. Const. art. I, § 1 5

§ 8 ..... 3, 5, 11-12

§ 8, cl. 1 6

U.S. Const. arts. I-III 3-4, 11

U.S. Const. art. III 12

Federal Statutes

20 U.S.C. § 1681 ..... 2, 8

§ 1681(a) 8

§ 1682 ..... 2, 8, 10

Federal Regulations

34 C.F.R. § 100.7(e) 9

§ 106.71 9

Rules of Court

Supreme Court Rule 37.3 1

37.6 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

Fallon, Richard H., Jr., et al.,
Hart and Wechsler's The Federal Courts and the Federal System (5th ed. 2003) 12

Jefferson, Thomas, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), *in* THE PORTABLE THOMAS JEFFERSON (Merrill D. Peterson ed., 1975) 6

Pilon, Roger, *On the First Principles of Federalism*, Cato Policy Report, November/December 1995, *available at* http://www.cato.org/pubs/policy_report/pr-nd-rp.html 5

Rosenthal, Albert J., *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103 (1987) 8

The Federalist (Clinton Rossiter ed., 1961) 5, 11

Wasson, Robert P., Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 Bankr. Dev. J. 77 (2003) 12

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Respondent.[1] Petitioner and Respondent consented to the filing of amicus briefs in support of either party on July 19 and July 27, 2004, respectively.

Pacific Legal Foundation is the largest and most experienced nonprofit public interest law foundation of its kind in America. Founded in 1973, Pacific Legal Foundation provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, individual freedom, and free enterprise. Pacific Legal Foundation litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. Pacific Legal Foundation is headquartered in Sacramento, California, and has offices in Miami, Florida; Honolulu, Hawaii; Bellevue, Washington; and a liaison office in Anchorage, Alaska.

Attorneys for Pacific Legal Foundation have previously litigated questions regarding the scope and meaning of federal civil rights legislation. For example, Pacific Legal Foundation attorneys represented the California State Board of Education in a case that alleged California's Proposition 227, an initiative replacing bilingual education with English immersion, violated federal regulations promulgated pursuant to Section 602 of Title VI of the Civil Rights Act of 1964. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998). PLF also participated as amicus before this Court in *Alexander v. Sandoval*, 532 U.S.

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[1] Pursuant to this Court's Rule 37.3, all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

275 (2001), a case involving the question of whether Congress intended to create a private right of action for "disparate impact" discrimination under Title VI.

Pacific Legal Foundation has a long history of advocacy before this Court in cases involving the interpretation of other federal laws as well. For example, Pacific Legal Foundation was *amicus curiae* in *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

Pacific Legal Foundation believes its public policy perspective and litigation experience will provide an additional viewpoint on the legal issues presented by this case.

SUMMARY OF ARGUMENT

The issue before this Court is whether Petitioner has a right of action for retaliation under Title IX, which prohibits state and local governments from sex discrimination in the operation of federally funded education. The constitutional principles of federalism and separation of powers, along with fairness and predictability in the law, strongly militate against this Court's implying a right of action for retaliation under Title IX.

Congress passed Title IX pursuant to its broad Spending Clause powers. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999). Title IX permits Congress to attach unambiguous conditions on state and local governments that accept federal funds for education. 20 U.S.C. §§ 1681-1682. Conditioning federal funding is Congress's way of indirectly regulating the conduct of recipient state and local governments in areas normally reserved to them, and those conditions are constitutional only if they are unambiguous and the recipients

knowingly consent to them. *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987). Unless based on such unambiguous and consented-to conditions, the regulation of purely state or local government activity, like education, is outside the scope of Congress's enumerated powers and violates the Tenth Amendment's decree that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X; *id.* art. I, § 8 (enumerating Congress's powers); *Dole*, 483 U.S. at 206-07.

When before a court, the question of what conditions the Congress and a recipient state or local government like Respondent have agreed to pursuant to Title IX implicates two fundamental constitutional principles: (1) the federalist principle of dual sovereignty, as reflected in the Constitution's enumeration of congressional powers, and in the Tenth Amendment, and (2) the separation of powers reflected in the Constitution's division of authority between the executive, legislative, and judicial branches of the federal government. U.S. Const. art. I, § 8 (enumerating congressional powers); *id.* amend. X; *id.* arts. I-III (dividing powers of federal government among the three branches).

Guided by these principles, the Court should conclude that it may not imply a right of action for retaliation under Title IX.

By implying a right of action for retaliation under Title IX, the Court would add a condition that Respondent could not have reasonably anticipated: exposure to liability for retaliation under Title IX. If the Court concludes (as it should) that neither the text, structure, nor history of Title IX supports such a right of action, then implying a right of action for retaliation anyway would expand the Congress's scope of authority over Respondent outside its enumerated powers. Inclusion into Title IX of a new condition would constitute nothing less than a

rewriting of that statute on behalf of Congress which, as revised, would violate the Tenth Amendment.

By the same token, a decision of this Court that implies a right of action for retaliation under Title IX where no evidence of one exists invades the exclusive province of the Congress. Only Congress can provide rights of action for violations of its federal laws, and the Court should not accept Petitioner's invitation to step into Congress's shoes and legislate for it in such a way. To do so would violate the separation-of-powers doctrine embodied in the first three articles of the Constitution. U.S. Const. arts. I-III (dividing powers between the legislative, executive, and judicial branches, respectively).

Moreover, the traditional presumption against retroactive legislation counsels against implying a right of action for retaliation under Title IX, which would expose Respondent to liability it could not have reasonably anticipated when it originally accepted federal funding. Further, such a decision would burden state and local governments who must try to evaluate the costs and benefits of participating in a federal funding program: How will they know what the nonexpress terms and conditions of federal funding are? Many could simply forgo federal funding in light of the undefined exposure to liability under Title IX and similar Spending Clause statutes, with the losers being the school children who would have benefitted from that funding. A decision that rejects an implied right of action for retaliation under Title IX, and defers to the Congress to add it if it so chooses, avoids these issues of fairness and predictability in the law.

For these reasons, the decision below should be affirmed.

ARGUMENT

I

THE PRINCIPLE OF FEDERALISM WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

The United States Constitution establishes a system of "dual sovereignty" based on the principle of federalism. By approving the Constitution, the people—in whom the power resided in the first instance—delegated some of its power to the federal government, delegated some of its power to the individual state governments, and reserved to itself all residual power. U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *id.* amend. X (referring to powers "not delegated," "prohibited," and "reserved" by the people); The Federalist No. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961) ("[The federal government's] jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); Roger Pilon, *On the First Principles of Federalism*, Cato Policy Report, November/December 1995, *available at* http://www.cato.org/pubs/policy_report/pr-nd-rp.html (making the case that all power initially resided in the people, who delegated some of it to the federal government and some of it to the states under the Constitution).

The Framers made dual sovereignty implicit in the Constitution with its conferral on Congress of specific, enumerated powers. U.S. Const. art. I, § 8. James Madison explained that a dual system of government would protect against federal usurpations of power. The Federalist No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961). Dual sovereignty was made explicit when the Tenth Amendment, which James Madison drafted, was added to the Constitution as

part of the Bill of Rights. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. Thomas Jefferson considered the Tenth Amendment "the foundation of the Constitution." Thomas Jefferson, *Opinion on the Constitutionality of a National Bank* (Feb. 15, 1791), in THE PORTABLE THOMAS JEFFERSON 261, 262 (Merrill D. Peterson ed., 1975).

Congress may legislate in harmony with the Tenth Amendment only pursuant to its enumerated powers, one of which is the Spending Clause power. U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties. Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."). Under its Spending Clause power, Congress may attach conditions on state and local governments' receipt of federal funds in order to enforce broad policy objectives that it could not otherwise directly enforce through the other enumerated powers. *Dole*, 483 U.S. at 206-207. As the Court in *Dole* said:

> [T]he power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within Article I's enumerated legislative fields may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.

Id. at 207 (internal citations and question marks omitted).

But Congress's spending power is constitutionally limited, and it cannot use it to circumvent the Tenth Amendment:

> The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of the general welfare . . . . Second, we have required that if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation. Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs . . . . Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Id. at 207-08 (internal citations and quotations marks omitted).

Of particular relevance in this case is the requirement that conditions on federal funding be unambiguous and knowingly agreed to. *Id.*; *see also Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."). Like the others, this requirement protects the Constitution's careful balance of powers between the federal government and the recipient state or local government by ensuring that the recipient does not involuntarily cede any authority. To that end, a conditional federal funding arrangement operates much like a strictly interpreted contract, and "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'" *Pennhurst*, 451 U.S. at 17 ("[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."). As one legal scholar put it:

> [The Court has demonstrated] a cautious approach to the construction of statutes that allegedly impose conditions on federal spending for the states. In acknowledging the potentially abrasive effect of such conditions, the Court has suggested that the arrangement be regarded as much in the nature of a contract: in return for federal funds, the States agree to comply with federally-imposed conditions. The Court has stated that, as a matter of interpretation, such a contract will not be found unless Congress has spoken unambiguously.

Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 Stan. L. Rev. 1103, 1141-42 (1987) (citations and internal quotation marks omitted).

Title IX is a Spending Clause statute that Congress enacted to fund and regulate the conduct of recipient state and local governments in education. 20 U.S.C. § 1681; *Davis*, 526 U.S. at 640. Title IX "amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). As the primary condition of federal funding, Title IX prohibits recipients from discriminating on the basis of sex in the operation of education programs or other activities. 20 U.S.C. § 1681(a).

Recipients are fully "cognizant of the consequences of their participation" if they violate the condition prohibiting sex discrimination: They may either lose the funds or face a private right of action in federal court by the victim of the alleged sex discrimination. 20 U.S.C. § 1682 (termination of funds); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (recognizing sex discrimination victim's right to sue under Title IX). The condition prohibiting sex discrimination on pain of losing funds or being sued under Tile IX was clear to Respondent when it accepted federal funds. Thus, recognizing

the condition, and all of the consequences flowing from its violation, do not implicate the Tenth Amendment.

Another condition, regarding retaliation, appears in the federal regulations:

> No recipient [of federal funds] or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [20 U.S.C. § 1681] or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e); *id.* § 106.71 (section 100.7(e) was originally promulgated by the Department of Justice to enforce Title VI, but in section 106.71 the Department of Education incorporated by reference section 100.7(e) and other regulations enforcing Title VI to enforce Title IX).

Petitioner's claim boils down to this: By accepting federal funding, Respondent knowingly consented to the condition set forth in that federal regulation that it would assume the risk of liability under Title IX for alleged retaliation against a person claiming noncompliance with Title IX. If Respondent were not the recipient of Title IX funds, Petitioner would be unable to bring *any* kind of Title IX claim against Respondent, much less a Title IX claim for retaliation. *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970) (state has "alternative choices" of complying with federal requirements or declining federal funds); *see also James v. Jones*, 148 F.R.D. 196, 200 (W.D. Ky. 1993) (" '[F]ederally imposed conditions' have no force, and potential beneficiaries have no cause of action, if a State refuses the federal funding to which those conditions are attached."). Thus, it is only on the basis of Respondent's acceptance of some condition in exchange for federal funds that Petitioner can make even a colorable argument that a right of action for retaliation exists under Title IX. The question is whether

Respondent agreed to the added exposure of liability for retaliation under Title IX as a condition of the federal funds.

Congress allows federal agencies to terminate federal funding for the violation of the nonretaliation regulation (and other regulations), but only after they satisfy certain procedural requirements, including giving the offending recipient notice and an opportunity to comply, providing it with a hearing, and reporting to Congress. 20 U.S.C. § 1682. This Court recently held that Congress's similarly elaborate scheme for enforcing *Title VI* regulations (after which Title IX was modeled) excluded the possibility that Congress intended to also create a private right of action as an alternative means of enforcement. *Sandoval*, 532 U.S. at 290-91 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others. . . . [I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself." (citations and internal quotation marks amounted).

The Court is urged to adopt the same holding here, with the principle of federalism in mind: Respondent was "cognizant of the consequences of [its] participation" in the Title IX program if charged with retaliation: It could be subjected to—*at most*—the loss of federal funding. By contrast, Respondent was not cognizant of the fact that it might be subjected to a Title IX lawsuit for alleged retaliation. If the Court were to recognize a right of action for retaliation under Title IX anyway, the Court would in effect alter the contract between the Congress and Respondent by imposing a condition that did not "unambiguously" exist in Title IX at the time Respondent accepted federal funding. And it would be doing so on behalf of the Congress, which expressed no intent to create a right of action for retaliation under Title IX.

The Tenth Amendment limits Congress's exercise of powers to those enumerated in Article I, section 8, reserving all other powers to the States or to the people. U.S. Const. amend. X. Absent an agreement by Respondent to submit to Title IX claims for retaliation at the time it accepted federal funds, the Court cannot imply a right of action for retaliation under Title IX. If it were to do so, it would expand the scope of Congress's power at the expense of Respondent and other state and local government recipients, in contravention of the Tenth Amendment.

II

THE SEPARATION-OF-POWERS DOCTRINE WEIGHS AGAINST JUDICIAL RECOGNITION OF AN IMPLIED RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

With the federalist principle of dual sovereignty, the separation-of-powers doctrine is at the heart of our constitutional form of government. Enshrined in the first three articles of the Constitution, the separation-of-powers doctrine ensures that each of the three branches of government will jealously guard against usurpations of authority by the other two and, in so doing, prevent the concentration of power. U.S. Const. arts. I-III; The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). As this Court so aptly warned:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to

> exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.

I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

Congress has the exclusive authority to create private rights of action to remedy violations of federal laws. U.S. Const. art. I, § 8 (granting Congress the authority to pass laws); *id.* art. III (granting Congress the authority to define the judicial power of the lower federal courts); *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); Robert P. Wasson, Jr., *Remedying Violations of the Discharge Injunction Under Bankruptcy Code § 524, Federal Non-Bankruptcy Law, and State Law Comports with Congressional Intent, Federalism, and Supreme Court Jurisprudence for Identifying the Existence of an Implied Right of Action*, 20 Bankr. Dev. J. 77, 206 n.23 (2003) ("One area in which the Court's recent separation of powers jurisprudence has been evident is in the area of implied rights of action.").

Over the last forty years, the Court has been increasingly reluctant to imply private rights of action for statutory violations. Richard H. Fallon, Jr., et al., *Hart and Wechsler's The Federal Courts and the Federal System* 781-83 (5th ed. 2003). Since the Court's 1975 decision in *Cort v. Ash*, 422 U.S. 66, 78 (1975), in which it articulated a stringent four-factor test for finding an implied right of action, the Court "has generally rejected claims of implied federal remedies." Fallon, *supra*, at 781; *see also* Wasson, *supra*, at 206 n.23 ("Beginning with *Cort v. Ash*, the Court has taken an increasingly hostile stance against finding implied rights of action.").

This reluctance is in no small part attributable to the Court's concern for preserving the separation of powers between the legislative and judiciary branches. *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 509 n.9 (1990) ("The test [employed to determine whether an implied right of action

exists for a violation of statutory law] reflects a concern, grounded in separation of powers, that Congress rather than the courts controls the availability of remedies for violations of statutes."). In *Sandoval*, this Court stated:

> The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy . . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute . . . . Having sworn off the habit of venturing beyond Congress's intent, we will not accept respondents' invitation to have one last drink.

Sandoval, 532 U.S. at 286-87.

Like dual sovereignty, the separation-of-powers doctrine informs this Court's analysis of whether it should imply a right of action for retaliation under Title IX.

Title IX does not confer a right of action for retaliation on individuals, much less those who have not even been directly discriminated against on the basis of sex. Yet Petitioner invites this Court to step into Congress's shoes and create such a right of action in the statute anyway. Were the Court to accept that invitation, it would be violating the separation of powers by legislating on Congress's behalf based on a hunch about what Congress may have intended. The Court should heed its own warning in *Sandoval* and avoid overstepping its constitutionally defined authority by creating new causes of action where Congress has expressed no intent to do so.

III

PUBLIC POLICY MILITATES AGAINST FINDING A PRIVATE RIGHT OF ACTION FOR RETALIATION UNDER TITLE IX

Besides implicating federalism and separation-of-powers concerns, recognizing a private right of action for retaliation under Title IX poses public policy problems.

First, finding a private right of action for retaliation under Title IX where that statute does not expressly provide for it would undermine fundamental notions of justice, particularly fairness and predictability. If Petitioner were to prevail, Respondent would be retroactively bound to a condition it could not have reasonably anticipated when it agreed to federal funding. Because the creation of a right of action for violation of a federal statute is a purely legislative act, the Court would be retroactively legislating by implying that one exists under Title IX. *Sandoval*, 532 U.S. at 286 ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."). Not only would this undermine the separation-of-powers doctrine as described in the previous Part, but it would also run counter to the presumption against retroactive legislation so deeply rooted in American jurisprudence:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted . . . . In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

Landgraf v. USI Film Products, 511 U.S. 244, 265-66 (1994) (holding that legislation creating new right to recover

compensatory and punitive damages for violations of Title VII, enacted while case was pending on appeal, did not apply to that case).

Further, if the Court were to establish the precedent of recognizing a right of action in a statute where none expressly exists, it would force state and local governments considering participation in federal funding programs to engage in costly and time-consuming guesswork about what conditions and consequences would bind them. Their exposure for liability under Title IX (and other statutes like it) would be undefined and subject to judicial expansion. In the face of such uncertainty, some state and local governments would undoubtedly forgo participation in federal programs like Title IX, to the detriment of schools and the children they serve. For this reason, this Court has characterized Title IX arrangements as contracts that deserve the same predictability and stability as other contracts:

> [L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." . . . There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst, 451 U.S. at 17 (internal citations omitted); *see also Landgraf*, 511 U.S. at 271 ("The largest category of cases in

which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance.").

Second, if the task of the Court is to discern the intent of Congress, then it has nothing to lose, and everything to gain, from refusing to recognize an implied right of action for retaliation under Title IX. Recognizing a right of action in a statute that does not expressly provide for it would risk compromising the principles of federalism and separation-of-powers, along with fundamental notions of justice, as discussed at length in this brief.

On the other hand, if the Court were to imply such a right of action for retaliation, the Court would avoid these constitutional and equitable problems. If the Court turns out to be mistaken, and the Congress *did* intend to provide for a right of action for retaliation under Title IX, Congress can easily correct that mistake through legislation that makes its intention express. This more cautious approach promotes democratic accountability by ensuring that the Congress, as representatives of the people and the lawmakers, are held to account for those legislative decisions—like the scope of liability to which it exposes local and state government participants in federal programs. *Conroy v. Aniskoff*, 507 U.S. 511, 528 (1993) (Scalia, J., dissenting) ("The language of the statute is entirely clear, and if that is not what Congress meant then Congress has made a mistake and Congress will have to correct it.").

CONCLUSION

The constitutional principles of federalism and separation of powers militate against the Court's implying a right of action for retaliation under Title IX. A contrary ruling risks disturbing the balance of powers between the federal government and the state and local governments, as well as between the legislative and judiciary branches of the federal government. Moreover, considerations of fairness and predictability strongly weigh against such judicial activism and in favor of permitting the Congress, if it so chooses, to make its legislative intent express.

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